

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

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In the Matter of)	
)	WT Docket No. 97-82
Amendment to Part 1 of the)	
Commission's Rules)	DA 97-679
)	
Competitive Bidding Proceedings)	

REPLY COMMENTS OF FORTUNET COMMUNICATIONS, L.P.

Fortunet Communications, L.P. ("Fortunet"), by its attorneys, submits these reply comments in the above-captioned proceeding.

I. INTRODUCTION

As a panelist in the June 30, 1997 Public Forum on Broadband PCS C & F Block Installment Payment Issues, Fortunet offers its views on the opinions expressed at the Public Forum to further the Commission's underlying goal of encouraging the entry of small businesses in the capital-intensive wireless telephony market. Fortunet believes that there is a reasonable solution to the issues presented that is in the public interest and fair to all parties involved.

II. FINANCIAL EXPERTS AGREE THAT THE C-BLOCK PRESENTLY IS UNFINANCABLE.

The experts on the Finance Panel of the Public Forum were unanimous that the C-Block, as a whole, is unfinancable in light of the high level of installment government debt that the licensees carry. For example, Lehman Brothers and Bear Stearns advocated that given current market conditions, the Commission must reduce the C-Block government installment debt to a level sufficiently below the "enterprise" value of the specific C-Block licensee to

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provide adequate equity to support further public debt and equity offerings.¹ The finance experts appeared to agree that to be financable, the Commission should restructure the C-Block installment debt to approximately \$10 per pop (or less) on a net present value basis. Toronto Dominion suggested during the Public Forum that in order to provide additional public financing, the installment debt principal would need to be reduced by 80 percent from the existing levels and that the Commission could consider taking an equity position in any C-Block licensee that chooses to reduce its installment debt. Further, BIA Capital Corp. demonstrated that the equity cost of capital for many of the smaller C-Block licensees, such as Fortunet, was upwards of 20 percent, indicating the high cost and difficulty of obtaining outside financing. And as the experts unanimously described, without the debt restructuring suggested, there is no equity value in the licensees because of the burdensome installment debt.

In sum, the Finance Panel presented the compelling case for bold and dramatic debt restructuring. The Commission plainly has authority to restructure the terms of C-Block financing,² and it should do so. Half-steps may provide some relief, but not enough to ensure the viability of the C-Block licensees and the expeditious roll-out of additional wireless services. While certain members of the Finance Panel, as well as certain licensees, favored principal reduction, other members and licensees favored interest forgiveness and payment deferrals. This range of possible restructuring options suggests that the Commission provide a range of options to C-Block licensees so that they may choose the restructuring alternative that best suits their financing needs.

¹ See e.g., Comments of Bear Stearns, WT Docket No. 97-82 (filed June 23, 1997).

² See Comments of NextWave at 22-24.

III. THE COMMISSION'S ROLE AS A CREDITOR SHOULD NOT UNDERMINE ITS ROLE AS POLICYMAKER.

The Commission has two complementary roles to play with respect to C-Block licensees -- that of a policymaker and a creditor. First, the Commission, in its role as a policymaker several years ago, crafted the C-Block so that it complied with Congress' mandate to "ensure that small businesses, rural telephone companies, and business owned by members of minority groups and women are given the opportunity to participate in the provision of spectrum-based services."³ Congress enacted this mandate because it was "well aware of the difficulties these groups encounter in accessing capital."⁴

As a Commission recognized in establishing the C-Block eligibility criteria, small businesses face high hurdles in raising the necessary capital to compete effectively in the wireless telephony market. The wireless mobile services market is "highly competitive," and the "costs of acquiring a license and constructing facilities are substantial."⁵ To provide small businesses with a chance to compete in this market, the Commission adopted an installment payment program for the C-Block PCS licenses. The installment program was designed to assist small businesses, who are "likely to have difficulty obtaining adequate private financing," by extending them credit in the event they won licenses in the C-Block auction.⁶ In adopting the

³ 47 U.S.C. § 309(j)(4)(D).

⁴ Implementation of Section 309(j) of the Communications Act - Competitive Bidding, *Fifth Report and Order*, PP Docket No. 93-253, FCC 94-178, at ¶ 97 (1994) ("*Fifth R&O*")

⁵ *Fifth R&O* at ¶ 111; see also *Omnipoint Corp. v. FCC*, 78 F.3d 620, 626 (D.C. Cir. 1996) ("[T]he primary impediment to participation by designated entities is a lack of access to capital.").

⁶ Implementation of Section 309(j) of the Communications Act - Competitive Bidding, *Second Report and Order*, PP Docket No. 93-253, 9 FCC Rcd 2348, at ¶ 233 (1994).

installment program and other preferences for small businesses, the Commission sought to “encourage the entry of small businesses in the PCS market.”⁷

This policy decision was appropriate three years ago when it was made and its public interest underpinnings are no less compelling today. In fact, the events that have transpired since the Commission established the C-Block have shown the percipience of the Commission’s policy decision. As the unmistakable consolidation trend continues in the telecommunications industry (*e.g.* SBC Communications/Pacific Telesis; Bell Atlantic/NYNEX; British Telecom/MCI; LDDS/WorldCom/MFS), the Commission’s decision to encourage small businesses to bring additional competition to the marketplace is even more compelling and apparent.

Accordingly, when the Commission is acting in its role as a creditor, it should take actions that are complementary to its policy decisions to encourage new competition in the wireless telephony market. Indeed, as the testimony of General Wireless and other C-Block licensees in the “question and answer” portion of the Public Forum’s Operators Panel made clear, these companies have done an enormous amount of preparatory work to ensure that wireless service is rolled out in an expeditious manner. For example, numerous licensees have prepared RF studies, relocated microwave licensees, selected cell sites, deployed antennas, installed mobile switches and initiated test operations. Any decision that the Commission makes in its role as a creditor with regard to debt restructuring should recognize that substantial work has already been done with respect to licenses and the promise these companies represent in bringing new competition to the wireless market.

⁷ *Fifth R&O* at ¶ 112.

A failure to support the C-Block now, as some have urged, would only undermine the policy objectives that the Commission is trying to accomplish without any countervailing public benefit. Some parties have suggested that the Commission should enforce strictly its rules and not restructure the installment debt. This will not lead to a prompt default/surrender/reaction scenario, but rather embroil the Commission in protracted bankruptcy proceedings that are expensive, time-consuming and fraught with uncertainty. Although Pocket Communications is the only C-Block licensee which has sought bankruptcy protection thus far, the testimony of the financial experts makes clear that licensees throughout the C-Block will have to follow suit absent any debt relief. While the licensees are in bankruptcy, the Commission's underlying goal of deploying additional spectrum may be frustrated, because buildout will not proceed and new wireless capacity will not be activated for use by the public. Any contention that the Commission can "just say no" to restructuring and reaction the licenses is simply not a viable alternative.

At the Public Forum, the Commission asked about the feasibility of an amnesty program, but without giving the specifics of such a program. If an amnesty program were merely to permit licensees to return all licenses without receiving in return the downpayments and interest payments that they have already made, the licensees (which do not in any case have the assets to pay penalties and default judgments) would again attempt to hold on to the licenses by declaring bankruptcy as discussed above. Being able to turn in certain licenses without penalties in order to concentrate on other licenses may help certain licensees (and could be considered as part of an overall program), but would not provide the substantial relief which the members of the Finance Panel say is necessary. To permit licensees to return their C-Block licenses in return for *all* of their payments, as a *voluntary alternative* to installment payment restructuring, may

benefit C-Block licensees as a whole by creating a solid core of committed licensees, and, in some cases, accelerate the reauction process.

Because the Commission is not simply a creditor and must adopt a policy that serves public interest objectives, it should treat all licensees similarly, or at least provide them with the same financing and restructuring alternatives. As a practical matter, the Commission may have no alternative: if the Commission restructures the installment debt of any licensee that is in bankruptcy and does not provide other C-Block licensees with the same financing alternatives, then other licensees will declare bankruptcy to take advantage of the restructuring that is available. Thus, there will be a “race to the bottom” to obtain the cheapest financing possible. The Commission must anticipate this marketplace behavior in any action that it takes.

IV. THE ARGUMENTS AGAINST RESTRUCTURING ARE ANTICOMPETITIVE AND LACK ANY GENUINE BASIS IN LAW OR EQUITY.

The main arguments against affording relief to C-Block licensees are advanced by large, well-heeled wireless competitors who have every incentive to see C-Block licensees fail and, thus, reduce competition.⁸ Indeed, that these parties raise objections to C-Block restructuring based on alleged “reliance” interests in the integrity of the auction process is ironic,⁹ given that these companies did not participate in the C-Block auction, have never been eligible to hold C-Block licenses, do not face the barriers to entry or lack of access to capital that

⁸ See e.g., Comments of Nextel; Comments of Sprint.

⁹ See e.g., Comments of Sprint at 2-3.

C-Block licensees face, and generally would incur no harm as a result of C-Block restructuring that would confer standing upon them to object to it.¹⁰

The other group of restructuring opponents are disgruntled losers from the C-Block auction (*e.g.*, AirGate Wireless and Airadigm Communications) that only seek to participate in a reauction of C-Block licenses. While it may be true that, with the benefit of hindsight, those bidders may have acted differently had they known at that time that there was the possibility of restructuring down the road, the fact remains that any auction, by definition, is entered into by each and every bidder with imperfect facts and educated guesses about the future. Given this landscape, the C-Block winners have made major investments at this point -- Fortunet has itself expended approximately \$25 million -- with no assurance of the outcome of this proceeding and no comfort that it can recoup its investment absent major relief. In short, the winners are simply situated differently from those who chose not to take these risks. And there are no obvious or compelling equities here that should drive this decision -- it is a policy matter for the Commission, predicated on the need for enhanced competition in wireless telephony.

Several parties raised arguments during the Public Forum that any Commission restructuring of C-Block debt would somehow be breaching the fundamental economic bargain struck between licensees and the Commission or undermining the integrity of the auction process. These arguments are without merit. C-Block licensees bid responsibly in the C-Block

¹⁰ See *DCR PCS, Inc.*, DA 96-1816, mimeo at 22-23 (Nov. 4, 1996) (petitioners had standing to challenge the licenses for markets won at auction only if the petitioner was qualified to bid in those markets); *In the Matter of Applications for A- and B-Block Broadband PCS Licenses*, Memorandum Opinion and Order (Apr. 1, 1996), at ¶ 7 (allegations that FCC actions in A- and B-Block PCS licensing were inconsistent with the public interest dismissed as "too contingent and speculative to support the required finding of a direct injury causally linked to the challenged action").

auction with every expectation that they would be able to secure additional adequate financing for their systems. The fact that these licensees are today in the position of having to seek relief from the agency with respect to repayment obligations is unfortunate -- but it does not mean that these bidders acted irrationally.

But now changed circumstances and market conditions warrant a Commission response, whether in the form of waiver or modification of the C-Block repayment obligations. Such action by the Commission is no more unfair than other rule or license modifications that might occur during the course of C-Block buildout and service provision. For example, in light of the recent World Trade Organizations ("WTO") agreement, wireless licensees may now be permitted by the Commission to bring in foreign equity ownership that far exceeds the ownership levels permitted at the time of the C-Block auction. The fact that such relief was not available then, but has become available now, does not render the C-Block auction a sham or negate the efficacy of the Commission's Rules. To the contrary, the Commission has the power and policy mandate to take action that will respond to changed circumstances in the context of ensuring both the rapid deployment of C-Block licenses and their development by qualified entrepreneurs.¹¹ It should do so.

Fortunet believes that any restructuring that the Commission engages in should be in addition to the relief that Fortunet has suggested previously, and which the financial experts endorsed. Namely, the Commission should (1) suspend interest payments, (2) extend the repayment terms to 20 years, (3) conform the control group equity rules to those governing WCS licensees, (4) ease the restrictions on the transfer of licenses and foreign equity participation, (5)

¹¹ See 47 U.S.C. § 309(j)(3)(A)(B).

return the March 31, 1997 installment payments made, and (6) reduce the interest rate on the installment notes to 6.5% or lower. These proposals are designed to promote the development of the C-Block through targeted relief that will encourage investment and facilitate timely system buildout. These proposals put forth by Fortunet, and supported by the record, would help make C-Block licensees more competitive in financial markets, which, in turn, will permit them to bring competition to the PCS market. Fortunet urges the Commission to adopt them in this proceeding.

V. CONCLUSION

For the foregoing reasons, the Commission should restructure the government installment debt and the financing terms of C-Block licenses, which would increase the competitiveness of the C-Block in financial markets and, ultimately, in the PCS market.

Respectfully submitted,

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